

What would not appear to be covered is the position of the remainderman who had come into possession. As he, speaking generally, is not the registered proprietor or a person registered with an interest in the land, he could not execute any instrument that would fall into any class enumerated in section 292. For this reason Miss W. A. Goh suggested that there was a lacuna in the law. If there was, it would not appear to help her case, since no lacuna in enacted law could be filled by a judicial decision, particularly one compelling an officer to do something which the law would appear to prohibit him from doing. But, with respect, I am not at all sure that there is a lacuna. For myself, I should imagine that read as a whole, in the scheme contemplated by the Code, the "omission", if I may so call it, to provide for such a case is deliberate.

The answer lies as much in the essential difference between a beneficial owner and a registered owner as in the doctrine of indefeasibility of title by registration.

Under the old English system, the contingent interest of the remainderman became converted on the death of the tenant for life into a vested interest as beneficial owner and he could thereafter deal with the fee simple or other interest in the land as such beneficial owner. The land system under the National Land Code is based entirely on registration and even within this restricted view, it can be readily seen that no one could deal with any holding before getting himself or herself registered with an interest therein.

As for the indefeasibility of title, it is provided in section 340 of the Code that the title to the holding shall be indefeasible except in certain circumstances e.g. fraud and forgery. In the presence of such provision, it becomes of the utmost importance that any instrument transferring the proprietorship of or interest in the land should show, on the face of it, the validity of the execution by the registered proprietor as transferor or the person with a registered interest in the land.

The registrar has certain powers of enquiry under section 302 to determine the fitness of any instrument for registration under Part Eighteen, which effectively means the instruments enumerated in section 292, but even then his powers are subject to the limitations set out in section 303. In sub-section (d) it is expressly provided that —

"in the case of any dealing effected by a person or body who is registered as trustee or representative, . . . he shall not be concerned to enquire whether the dealing is consistent with the trusts by which the land or interest in question is affected or contrary to any prohibition or limitation in the instrument creating the trusts."

Where as in the present case, the dealing is not by a registered proprietor as trustee but by a remainderman whose name has been kept away from the register in compliance with the provisions of keeping trusts out of the register, the Registrar does not have any powers of enquiry or investigation.

It ought to be realised that as a necessary corollary to this indefeasibility by registration, which amounts almost to a state guarantee of title, there can be no provisions for any requisition on title, or any requirement on the party purporting to deal with the land or his solicitor on the principle of liability to one's prin-

cipal, to perfect the title. It is therefore understandable if the Registrar should refuse to accept for registration any instrument outside the scope of section 292.

Provision is consequently made in the Code for an appeal from any decision, including a refusal, of the Registrar. It lies in section 418. The general powers of the court or a judge are contained in section 417 which are exercisable whether on appeal or in an original application and it is there that a proper scrutiny could be made and the title of a proper claimant be declared and affirmed and perfected by subsequent registration on an order of court. This was the action to which the Deputy Commissioner of Land Titles Penang referred in his affidavit of 8 February 1973 as required to be taken by the first plaintiff to have herself registered as the proprietress of the said land. Until such registration, she could not obviously deal with the land, at least not in a way that would enable her to obtain registration of any instrument executed by her.

As I understand it, this action was taken in the form of a writ for a declaration and not by way of an appeal from the refusal of the Registrar because counsel for the plaintiffs sought a general declaration for the future guidance of the Commissioner. No objection was taken by the Legal Adviser to this form but even then, with respect, I do not see how I can accede, even if I agree with the plaintiffs, to the request.

There is of course nothing to prevent the first plaintiff from applying under section 417 of the Code and the Rules of the Supreme Court for directing the Registrar to register her as the owner of the land, upon her rights of a remainderman falling into possession, but the action as instituted is dismissed. Since this was treated by all parties very much as a test case, I think the fairest order I can make is that both parties shall bear their own costs.

Action dismissed.

Solicitors: G. H. Goh & Co.

WONG LAI FATT v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Ali and Ong Hock Sim F.JJ.)

April 17, 1973]

[Kuala Lumpur — Federal Court Criminal Application

No. 12 of 1972]

Penal Code, ss. 100 and 302 — Murder — Plea of guilty — Right of private defence — Failure of counsel to plead exception — Criminal Procedure Code (F.M.S. Cap. 6), Ch. XVII — Courts of Judicature Act, 1964, s. 50(2).

This was an appeal against conviction of the appellant on a charge of murder under section 302 of the Penal Code to which he had pleaded guilty. The appellant had stabbed to death a man who was attempting to rape the appellant's wife. The appellant was sentenced to 4 years imprisonment, despite evidence disclosing that the case fell within one of the general exceptions under the Penal Code. Since the appellant was precluded by section 50(2) of the Courts of Judicature Act 1964 from appealing except as to the extent of or legality of the sentence because of his plea, this appeal came before the Federal Court by way of an application for special leave to appeal out of time.

Held, allowing the appeal: there had been a miscarriage of justice in the conviction in the instant case, where the prosecution case itself clearly raised the right of private defence, which justified infliction of the fatal injury in defence of the appellant's wife. The appellant should have been entitled to an acquittal and the plea altered to one of not guilty once the court had been appraised of all the material and undisputed facts which made an unqualified plea of guilty impossible. Not only the extent but the legality of the sentence was in issue. Accordingly, the conviction and sentence should be quashed.

Observations on the duty of magistrates in framing the proper charge.

Cases referred to:-

- (1) *Doyle v. Olby Ltd.* [1969] 2 Q.B. 159, 166.
- (2) *Christopher Ingelson* 11 Cr. App. R. 21.
- (3) *Griffiths* 23 Cr. App. R. 153.

FEDERAL COURT.

R. C. Hoffman for the appellant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Ong C.J.: At about 4 p.m. on February 27, 1972 the appellant stabbed a man who was attempting forcibly to rape the appellant's wife. The man died in hospital 4 hours later. The appellant was arrested immediately on arrival of the police at the scene and on the following day he made a full and frank confession to a Magistrate. Its truth was never doubted by the prosecution.

On May 17 and 18 a preliminary enquiry was held. The appellant's wife gave evidence that she had been compelled — by the deceased's threats of death or serious bodily injury to her husband if a debt of \$120 was not speedily repaid — to accompany the deceased to two hotels to earn money by prostitution. Part payment thus made left a balance of \$55 of the principal sum due. The appellant raised this sum by pawning some jewellery at 9 a.m. on February 27, 1972. This transaction was proved by the pawnshop clerk. The \$20 further demanded as interest was borrowed by the appellant from his brother who confirmed having seen this sum paid over the deceased.

Thus on the afternoon on February 27, 1972 the appellant had settled his debt to the deceased in full. The latter, however, had planned that the appellant's wife, who was young and attractive, should carry on earning money for him. He drove in a borrowed car to the appellant's house, accompanied by two men, obviously as a show of force. The appellant and his wife bluntly rejected the proposition. They had been only recently married, four months earlier. Ignoring the rebuff the deceased added insult to injury by proposing, regardless of the presence of the appellant, that his wife should have intercourse with the deceased himself then and there. He proceeded to drag her by force into an adjoining bedroom, stripped her and pushed her on to the bed. She shouted for help and the appellant, arming himself with a knife, came to her rescue. The subsequent autopsy on the deceased showed that he received only one fatal wound in the chest — the rest being mainly of a superficial nature.

On the whole of this evidence, produced at the preliminary enquiry together with the appellant's confession, it seems to us that the Magistrate framed a charge of murder under section 302 of the Penal Code

- A** without having given any thought whatsoever to the evidence before him. A Magistrate conducting an inquiry under Chapter XVII of the Criminal Procedure Code has power to discharge an accused person if no *prima facie* case has been made out for committal. Where there is a *prima facie* case, he has to frame the charge according to the evidence. Hence it was the clear duty of the Magistrate to frame what in his opinion should be the proper charge on which to commit the accused for trial. It is not every homicide that amounts to murder, and we would advise all Magistrates to take care that they do not commit the accused in all types of homicide cases, as a matter of course, for murder under section 302, whenever it is clear enough that the prosecution evidence at most could establish nothing more than culpable homicide *not* amounting to murder. By so discharging their duty conscientiously, our courts will not only maintain a high reputation for administration of justice, but also save the prosecution needless labour and public expense and above all, spare the accused long months of mental agony while a capital offence hangs over him pending his trial.
- B**
- C**
- D** In the instant case the problem raised is the fact that the appellant had been ill-advised to plead guilty, so that he is now precluded by sub-section (2) of section 50 of the Courts of Judicature Act 1964 from appealing except as to the extent or legality of the sentence.

The facts related by prosecuting counsel after the plea of guilty had clearly disclosed that the case fell under one of the general exceptions to criminal liability contained in Chapter IV of the Penal Code. It was not too late, even at the stage, to apply for the plea being altered to one of not guilty, since the prosecution case itself disclosed facts which justified changing the plea. The learned trial judge, we feel sure, would not have rejected the application in the interests of justice.

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F The more serious omission, however, was failure by defence counsel to refer to and lay stress on the provisions of section 100 of the Penal Code which *inter alia* provides that, in the case of an assault with the intention of committing rape, the right of private defence extends, if necessary, to the voluntary causing of death or any other harm to the wrong-doer. With all respect to counsel, the plea in mitigation was nothing if not feeble. Here was a man defending his bride of 4 months who was forcibly being raped. There was only one fatal wound, the others being superficial — which went to prove that no more force was intended than necessary to defend the wife from further attack. Pulling off the deceased, without actually disabling him, would have had dangerous consequences, for the deceased had two able-bodied companions in attendance who could have beaten the appellant and his wife to a pulp. Above all, the extreme provocation offered — in such contemptuous fashion as the deceased did by attempting rape on a wife as if the presence of her husband counted for nothing — was so outrageous that the degree of force used in defence of the women ought not to be measured in delicate scales to be judged as excessive. But since no defence whatsoever was raised in answer to the charge the appellant was sentenced to four years imprisonment on September 25, 1972. This appeal now comes before us by way of an application for special leave to appeal out of time.

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The appellant was represented at the trial by counsel whose duty it was to advise him. The plea of guilty was in our opinion a grave mistake because, according to the prosecution case itself, the right of private defence stood out plain as a pikestaff. The omission of counsel, whilst addressing the court in mitigation, to make even a passing reference to the provision in section 100 of the Penal Code which any practitioner, however lacking in experience of criminal law and practice, could not have failed to cite to the court as fully exonerating the appellant for what he had done, showed the gravity of the lapse on the part of defence counsel. It is therefore not surprising that the appellant did not know, as he was not advised, of his right of appeal against the sentence.

The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning M.R. in *Doyle v. Olby Ltd.*:⁽¹⁾

"We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side".

Those words were said in a civil case where counsel had made an erroneous submission on the proper measure of damages. It is even more important that this principle should apply where a man's life or personal liberty is at stake. It had been submitted in a 1914 case before the Court of Criminal Appeal in England that there was no precedent for quashing a conviction where the appellant had pleaded guilty to the indictment: see *Christopher Ingleson*:⁽²⁾ but the conviction was nevertheless quashed by Lord Coleridge on the ground that the plea of guilty had been made by mistake. There the appellant, on pleading guilty, had handed up a written statement to the recorder which, if believed, was a complete exculpation, and the learned judge said:—

"If the recorder read that, it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty and to have such a plea entered".

Again, in *Griffiths*:⁽³⁾ Lord Hewart L.C.J. held that despite a plea of guilty, the court would review a conviction where there was a good defence in law — the prisoner having pleaded guilty under a misapprehension to bigamy.

In the instant case, where the prosecution case itself clearly raised the right of private defence, which justified infliction of the fatal injury in defence of the appellant's own wife — and it was never suggested that any more force was used than was necessary to prevent the rape from being carried out — we are of opinion that there had been a miscarriage of justice in the conviction itself. The appellant should have been entitled to an acquittal and the plea altered to one of guilty once the court had been apprised of all the material and undisputed facts which made an unqualified plea of guilty impossible. Not only the extent but the legality of the sentence is in issue.

On the admitted facts, we are of opinion that the proper verdict should have been an acquittal. We accordingly quash the conviction and sentence.

Appeal allowed.

Solicitors: *Allen & Gledhill.*

PETER LAI KHEE-CHIN & ANOR. v. COLLECTOR OF STAMP DUTIES

[A.C.J. (Gill F.J.) April 23, 1973]

[Kuala Lumpur — Originating Motion No. 52 of 1972]

Stamps — Transfer of land by a person to himself and his wife — No beneficial interest in property passing to himself — Whether stamp duty payable — Prohibition on transfer of part of alienated land — National Land Code, s. 214(1)(a) — Stamp Ordinance, 1949, ss. 2, 16(1) and (4) and Item 32(a) of First Schedule.

The first appellant, being desirous of making an *inter vivos* gift of an undivided half interest in certain land belonging to him executed a memorandum of transfer of the whole of his interest in the land to himself and his wife in undivided equal shares. The Collector of Stamp Duty assessed the stamp duty on the whole of the market value of the land. The appellants did not dispute the Collector's assessment of the market value of the land or that stamp duty was payable on the value of the half-share of the land transferred to the wife but they contended that stamp duty was not payable on the value of the other half-share.

Held: as no beneficial interest passed in the half-share under the transfer from the first appellant to himself, stamp duty was only payable on the transfer of a half-share in the land, that being the value of the only beneficial interest which passed under the transfer.

Case referred to:—

(1) *Re Robb's Contract* [1941] 3 All E.R. 186.

CASE STATED.

Roger Tan for the appellants.

Rahmat bin Haji Jamari (Federal Counsel) for the respondent.

Gill F.J.: This is an appeal by way of case stated by the Collector of Stamp Duty on the requisition of the appellants pursuant to section 39 of the Stamp Ordinance, 1949.

The facts of the case stated are that Peter Lai Khee-Chin (the first appellant), being desirous of making a gift *inter vivos* of an undivided half interest in his land held under Q.T.(M) 115 Lot No. 131 Mukim of Ampang, Kuala Lumpur to his wife Susie Chen Moi Ching (the second appellant), executed a memorandum of transfer dated July 19, 1972 whereby he transferred the whole of his interest in the said land to himself and his wife in undivided equal shares. He resorted to this device of conveying the whole of his land to himself and his wife because section 214(1)(a) of the National Land Code provides that the whole, but not a part only, of any alienated land shall be capable of transfer under the Code.

The question submitted by the collector on the case stated for the determination of this court is what stamp duty is chargeable on the memorandum of transfer in question.

Section 2 of the Stamp Ordinance, 1949 defines "conveyance on sale" as including "every instrument and every decree or order of any court, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction". Section 16(1) of the Ordinance provides that "any conveyance or transfer operating as a voluntary disposition *inter vivos*, not being a settlement, shall be chargeable with the like stamp duty